(3) (1)

IN THE HIGH COURT OF JUDICATURE AT BILASPUR (C.G.)

Cr.A. No. 239 of 2002

CRIMINAL APPEAL u/s 374(2) OF THE Cr.P.C. 1973.

APPELLANT ACCUSED (IN JAIL) :

1. Gendlal s/o Banwali Satnami aged about 29 years.

2. Mahendra s/o Banwali Satnami aged about 25 years

All resident of village Manikpuri P.S. Nawagarh Distt. Durg.

2752
Shri Hemant Tekchandani Advocate
R. to D.R. (J)
16/7

VERSUS

RESPONDENT : State of Chhattisgarh.

A.C.R. (29)

HIGH COURT OF JUDICATURE AT BILASPUR (CHHATTISGARH)

CORAM: HON'BLE MR. L.C. BHADOO AND
HON'BLE MR. DHIRENDRA MISHRA, JJ.

Criminal Appeal No.669 of 2002

Uttra Kumar & Others

Vs.

State of Chhattisgarh

AND

Criminal Appeal No.739 of 2002

Gendlal & another

Vs.

State of Chhattisgarh

Present:

Smt. Hamida Siddique, Advocate:	For appellants in Cr.A. No.669 of 2002.
Smt. Renu Kochar, Advocate:	For appellants in Cr.A. No.739 of 2002.
Shri U.N.S. Deo, Additional Public Prosecutor with Shri Akhil Mishra, P. L.:	For the State/respondent.

ORAL JUDGMENT

(Delivered on 18th April 2006)

The following judgment of the Court was delivered by ***Justice L.C. Bhadoo.***

1. Criminal Appeal No.669 of 2002 preferred by accused/appellants Uttra Kumar, Amol Kumar and Bhagat @ Dhalwa and Criminal Appeal No.739 of 2002 preferred by accused/appellants Gendlal & Mahendra are being disposed of by this common judgment, as both these appeals are arising out of same judgment and the same incident in which three persons namely Deehu, Ratan and Bahoran were done to death.

2. By these appeals, the accused/appellants have questioned legality and correctness of the judgment of conviction and order of sentence dated 14-6-2002 passed by the 3rd Additional Sessions Judge (Fast Track Court) Bemetara in S.T. No.219/93 whereby learned Additional Sessions Judge after holding accused/appellants Gendlal, Mahendra, Uttra Kumar, Amol Kumar and Bhagat @ Dhalwa guilty for commission of offence under Sections 148 and 302 read with Section 149 of the I.P.C. for committing murders of Deehu, Ratan and Bahoran, sentenced each of the accused/appellants to undergo R.I. for 6 months and to undergo imprisonment for life for each murder, respectively. It was further ordered that all the sentences imposed upon the accused persons shall run concurrently.

3. The case of the prosecution, in brief, necessary for the disposal of these appeals was that Dukalha Bai was the owner of the agricultural land ad measuring 2.08 decimal of village Manikpur. As she was issueless, therefore, she adopted one of accused Jagdish, son of her brother. After her death, Jagdish was in possession of that land and even his name was entered in the Revenue Record as a heir of Dukalha Bai. Brother-in-law Revaram, brother of husband of Dukalha Bai was claiming his right on the said land as he was residing in village Sariyarpur, Tehsil Lormi, District: Bilaspur, therefore, he executed a power of attorney in favour of Aghnu of village Manikpur on 18-11-91 for looking after the said land of Dukalha Bai, on account of that there were 2 parties, one belonging to the section of Jagdish and other belonging to the power of attorney holder Aghnu. Even the matter regarding ownership of the land filed by Revaram was pending in the Court of Tehsildar and S.D.O., Revenue. Ultimately, the matter was decided in favour of Jagdish. The accused/appellants were the members of Jagdish party whereas, the deceased persons were the members of Aghnu party.

4. On 15-12-92 at about 7 a.m. when Deehu went to fetch water from a well which was near the house of Gendu Satnami, Pokhraj, who lodged the report, was also going towards his house from the side of the said well. He saw that in the house of Gendu Satnami, Amol, Asha, Uttra Kumar, Bansi and Bhagwat were hiding themselves armed with Tabbal and Lathi. Accused Mahendra and Gendu carrying Tabbal went near Deehu and assaulted him with the baith of

Tabbal on his hand, as a result of which Deehu fell down. At that time, Ratan and Bahoran, son of Deehu came on the scene of occurrence, on which Gendu Satnami and Mahendra assaulted Ratan with Tabbal on his neck and hand, as a result of which Ratan also fell down. They also assaulted Bahoran with Tabbal and Lathi. He also fell down. Thereafter, the matter was reported by Pokhraj in the Police Station Navagarh on the same day at 9.30 a.m. vide first information report (Ex.-P/1). Station House Officer Ashok Sharma after registering the Crime No.147/92, left for the scene of occurrence, after giving notice (Ex.-P/4) to the Panchas, prepared Panchanamas Ex.-P/5 of the body of Bahoran, Ex.-P/6 of the body of Ratan and Ex.-P/7 of the body of Deehu. Under Ex.-P/8, he took into possession one piece of Lungi stained with blood from the place near the body of Ratan, one Dhoti stained with blood, and one pair of shoe of Ratan. Under Ex.-P/9, he took into possession blood stained Dhoti, one pair of shoe and Kurta of deceased Bahoran. Under Ex.-P/10, he took into possession one Gamcha, one Dhoti, another Dhoti and one pair of shoe of deceased Deehu.

5. While in the police custody, accused Gendlal gave memorandum Ex.-P/11, accused Mahendra gave memorandum Ex.-P/12, accused Uttra Kumar gave memorandum Ex.-P/13, accused Amol Kumar gave memorandum Ex.-P/14, accused Jagdish gave memorandum Ex.-P/15, accused Bansi gave memorandum Ex.-P/16, accused Bhagat gave memorandum Ex.-P/17 and accused Asharam gave memorandum Ex.-P/18. In pursuance of above memorandums, he recovered one iron Tabbal at the instance of accused Mahendra under Ex.-P/19. He recovered one Lathi at the instance of accused Uttra Kumar under Ex.-P/20. Under Ex.-P/21, he recovered one iron Tabbal at the instance of accused Amol Kumar. Under Ex.-P/22, he recovered one iron Tabbal at the instance of accused Asharam. Under Ex.-P/23, he recovered one iron Tabbal at the instance of accused Jagdish. Under Ex.-P/24, he recovered one bamboo lathi at the instance of accused Bansi. Under Ex.-P/25, he recovered one iron Tabbal at the instance of accused Bhagat. Under Ex.-P/26, he recovered one iron Tabbal at the instance of accused Gendlal. These Tabbals were sent for the doctor's opinion and the doctor vide Ex.-P/30 & P/31 gave his opinion that injuries received by Aghnu, Deehu, Ratan and Bahoran could be caused by the recovered Tabbals. The site plan (Ex.-

P/38-A) was prepared by the I.O. as well as Patwari. The dead bodies of Deehu, Ratan and Bahoran were sent for the postmortem examination to the Primary Health Centre, Navagarh where Dr. V.K. Tamrakar, Assistant Surgeon, conducted the postmortem on the dead bodies of the deceased persons and prepared the postmortem report Ex.-P/27 of the body of Ratan, Ex.-P/28 of the body of Deehu and Ex.-P/29 of the body of Bahoran. He opined that mode of death of Ratan was syncope due to haemorrhage. About the death of Deehu, he opined that cause of death was due to syncope due to haemorrhage. About Bahoran, he opined that cause of death was coma due to head injury. Plain soil and blood stained soil was taken into possession from the place of occurrence under Ex.-P/42, P/43 and P/44. Mukhtiyarnama executed by Revaram in favour of Aghnu was taken into possession under Ex.-P/45. The articles were sent for chemical examination to the Forensic Science Laboratory, Sagar from where report Ex.-P/52 was received.

6. After completion of the investigation, charge sheet was filed against accused Asharam, Uttra Kumar, Amol Kumar, Bhagat, Gendlal, Mahendra, and Jagdish in the Court of Judicial Magistrate, 1st Class, Bemetara who in turn committed the case to the Sessions Judge, Durg, from where learned Additional Sessions Judge, Bemetara received the case on transfer for trial. Accused Asharam and Bansi died during trial. However, accused Jagdish was acquitted of all the charges and five accused/appellants were convicted and sentenced as mentioned in para-2 of this judgment.

7. The prosecution in order to establish the charge against the accused persons examined 16 witnesses. On the other hand, statements of the accused persons were recorded under Section 313 of the Cr.P.C. in which they denied the prosecution evidence appearing against them and stated that they are innocent and have been falsely implicated in the crime. Accused Gendlal has stated that at the time of the incident he had gone to attend the call of nature. When he returned, he saw that Ratan, Bahoran and Deehu were quarrelling with Bansi and Asha. Accused Mahendra has stated that he is innocent and has been falsely implicated in the crime. Similar was the denial of accused Amol Kumar, Jagdish and Bhagat. They examined 6 witnesses in defence. Accused Jagdish examined himself as DW-3. He stated that at the

time of the incident, he was in village Guna. The accused persons also examined DW-4 Dr. Shrikant Rajimwale, Assistant Surgeon of Government Poly Clinic, Raipur. He has stated that on 15-12-92 at 5 p.m. he examined Bansi and found that on the back of body there was abrasion of 4" in length. There was bruise and abrasion on the chest. There was lacerated wound on the head. These injuries were caused by hard and blunt object. He has further stated that on the same day he examined Mahendra and found that there was lacerated wound on the left hand. His reports are Ex.-D/3 & D/4.

8. We have heard learned counsel for the parties.

9. The homicidal deaths of deceased persons Deehu, Ratan and Bahoran have not been disputed by learned counsel for the accused/appellants.

10. As far as involvement of the accused/appellants in commission of the crime in question is concerned, Smt. Hamida Siddique, learned counsel, argued that complainant PW-1 Pokhraj, injured witness PW-2 Aghnu, PW-4 Prem Bai, wife of deceased Ratan, PW-6 Uttra Bai and PW-8 Bhagwat have turned hostile. The prosecution has not been able to establish with legal evidence as to how the incident started. The case against the accused/appellants rests on the ocular evidence of PW-3 Kanhaiya, PW-7 Uttam, son of Kanhaiya and PW-13 Holiram, son of Uttam and grandson of Kanhaiya. From the evidence of these 3 witnesses, it has not been established that accused Uttra Kumar, Amol Kumar and Bhagat were the members of unlawful assembly and they had participated in the marpeet in any manner. From their evidence, it has not been established that these accused persons were knowing that accused Gendlal and Mahendra were going to commit murders of the deceased persons. There is no evidence that they were sharing common object with Gendlal and Mahendra. She also argued that from the site plan Ex.-P/38-A prepared by the Investigating Officer, it is established that the place of occurrence as shown by the I.O. was near the house and in the field of accused Gendlal. In this incident, accused Bansi and Mahendra also received injuries. The deceased persons were carrying Lathi and Tabbal.

11. She further argued that from the evidence, it is established that all the 3 witnesses are from one family i.e. grandfather, son and grandson and they

were having inimical relations with the accused party. The house of witness Uttam was about 1 km from the place of occurrence. In the circumstances, it was not possible for these persons to witness the crime in question at about 7 a.m., therefore, conviction of these accused/appellants for the various offences is not based on any legal evidence and same is erroneous.

12. Smt. Renu Kochar, learned counsel appearing on behalf of accused/appellants Gendlal and Mahendra, argued that the place of occurrence was near the house of accused Gendlal. From the evidence, it is established that accused Mahendra and Bansi received injuries. The complainant party was aggressor. They assaulted the accused party. As per the evidence of PW-14 Ashok Sharma charge sheet has already been filed against Aghnu, Deehu, Ratan, Kanhaiya, Bahoran, Pokhraj, Dhannu, Ishwar and Uttam for the commission of offence under Sections 147, 148, 323 and 324/149 of the I.P.C. at the same time which has been admitted by the prosecution witnesses that case is pending against them. At the most, the accused persons exercised the right of private defence, as the deceased persons came to their field and attacked accused Mahendra & Bansi, therefore, in the right of private defence in order to save themselves, they assaulted. She further argued that first information report lodged by PW-1 Pokhraj has not been proved as Pokhraj has turned hostile, therefore, conviction of these accused/appellants is also erroneous.

13. On the other hand, Shri U.N.S. Deo, Additional Public Prosecutor with Shri Akhil Mishra, Panel Lawyer for the State/respondent supported the judgment of the trial Court.

14. Having heard learned counsel for the parties, we have scrutinized evidence, documents and the judgment of the trial Court.

15. Now, coming to the involvement of accused/appellants Uttra Kumar, Amol Kumar and Bhagat @ Dhalwa in crime in question, PW-3 Kanhaiya has stated that the incident took place at the time of sunrise. He was at his residence and on hearing the sound, he went near the well of Gendlal. There the quarrel took place from well up to the paddy field of Gendlal. Deehu, Ratan and Bahoran were there. From other party, Gendlal, Mahendra, Asha, Bansi,

Bhagat, Uttra and Amol, total 8 persons were there. Accused Gendlal and Mahendra were holding Tabbal. Accused Asha and Bansi were also holding Tabbal. Others were holding lathi. First of all, they assaulted Ratan, Gendlal assaulted with Tabbal, Mahendra assaulted Bahoran with Tabbal and remaining persons were standing. Thereafter, Jagdish came and he assaulted Deehu with Tabbal. He has further stated that all the 3 died on the spot. The incident was seen by Uttra Bai, Prem, Pokhraj, Uttam and by him. However, in the cross-examination, he has stated that there is bore-well between the house of Deehu and Gendlal. There is well in the backyard of the house of Deehu. Deehu fell in the threshing field of Gendlal. He saw bucket in the hands of Deehu. The well, which is adjacent to the house of Gendlal is not of Gendlal but it is the public well. Bahoran fell down after receiving the injuries near the house of Gendlal. He fell down at a distance of 20-25 steps from the well. Ratan was lying dead in the threshing field of Gendlal. In the cross-examination, he has further stated that if he has stated in the examination-in-chief that Ratan fell down first of all, then it is incorrect. Gendlal assaulted Bahoran, as a result of which he fell down. It is incorrect that Mahendra assaulted Bahoran, except Gendlal and Mahendra nobody else assaulted Ratan and Bahoran. It is also correct that Deehu was not assaulted by anyone else except Jagdish.

16. PW-7 Uttam has stated that the incident took place at about 7 a.m. in the house of Gendlal. There is a public well in the house of Gendlal. Gendlal assaulted Bahoran with Tabbal. Jagdish assaulted Deehu with Tabbal. Mahendra assaulted Ratan with Tabbal. He saw that all the 3 persons were lying on the ground, and thereafter, he returned to his house. Asha, Uttra, Amol, Bansi, total 8 persons were there. PW-13 Holiram has stated that Jagdish assaulted Deehu with Tabbal, Gendlal assaulted Bahoran with Tabbal and Mahendra assaulted Ratan with Tabbal. Uttra Kumar, Dhalwa, Asha, Bansi came after Deehu, Ratan and Bahoran had died. PW-3 has categorically stated in the cross-examination, in para-13, that Deehu, Ratan and Bahoran were assaulted only by Gendlal, Mahendra & Jagdish and others had not assaulted them. Similarly, PW-7 has simply stated that these 3 accused persons assaulted the deceased persons. He has also stated that Asha, Uttra, Amol, Bansi were also there, but he has not stated that in any manner

they were holding any weapon whereas, PW-3 has stated that they were having lathi in their hands. PW-13 has stated that Jagdish, Gendlal and Mahendra assaulted the deceased persons and these accused/appellants came after the deaths of Deehu, Ratan and Bahoran. Moreover, Dr. Vinay Kumar Tamrakar (PW-9), who conducted the postmortem, has stated that injuries, which were inflicted on the body of Deehu, were caused by hard and sharp object. Similarly, he has stated that injuries sustained by Bahoran were also caused by hard and sharp object. Similar nature of injuries were found on the body of Ratan. Therefore, there was no chance that those injuries were inflicted by any blunt object like lathi, whereas, PW-3 Kanhaiya has stated that these persons were holding lathis. In view of the above evidence, it is established that no injury was inflicted on the bodies of Deehu, Ratan and Bahoran by any hard and blunt object.

17. Moreover, if we look into the recovery memos, from Uttra Kumar one lathi was recovered whereas, from Amol Kumar one Tabbal was recovered under Ex.-P/21, from Bhagat one Tabbal was recovered under Ex.-P/25, whereas, eyewitnesses have not stated that Bhagat and Uttra were holding Tabbals. As per the evidence of eyewitnesses, these 3 appellants were carrying lathis, but they have not stated that they assaulted with lathi and the injuries found on the bodies of the deceased persons, as per the medical evidence, were caused by hard and sharp object. Contrary to the ocular evidence, the I.O. had recovered Tabbal from the possession of Uttra and Bhagat, therefore, from the prosecution evidence, the assault made by these persons to the deceased persons has not been established.

18. As far as their conviction with the aid of Section 149 of the I.P.C. is concerned, in order to attract the provisions of Section 149 of the I.P.C., Section 149 IPC creates a specific and distinct offence, there are two essential ingredients thereof- (1) commission of an offence by any member of an unlawful assembly, (2) such offence must have been committed in prosecution of the common object of that assembly or must be such as the members of that assembly knew to be likely to be committed, therefore, in order to bring the act of accused within the mischief of section 149 of the I.P.C., the accused must be, at the time of commission of offence, the

member of unlawful assembly. As per the settled law for common object, no prior concert is required. Common object can be formed at the spur of the moment. Course of conduct adopted by the members of the assembly, however, is a relevant factor. At what point of time the common object of the unlawful assembly was formed would depend upon the facts & circumstances of each case. It may be formed at any stage or by all or new member of the assembly or other members may just join or once formed it need not to be continued with the same, it may be modified or altered at any stage. In the matter of **Rajendra Shantaram Todankar V. State of Maharashtra & Others** reported in **(2003) 2 SCC 257** the Apex Court held that:-

> "Section 149 of the Indian Penal Code provides that if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who at the time of the committing of that offence, is a member of the same assembly is guilty of that offence. The two clauses of Section 149 vary in degree of certainty. The first clause contemplates the commission of an offence by any member of an unlawful assembly which can be held to have been committed in prosecution of the common object of the assembly. The second clause embraces within its fold the commission of an act which may not necessarily be the common object of the assembly, nevertheless, the members of the assembly had knowledge of likelihood of the commission of that offence in prosecution of the common object. The common object may be commission of one offence while there may be likelihood of the commission of yet another offence, the knowledge where of is capable of being safely attributable to the members of the unlawful assembly. In either case, every member of the assembly would be vicariously liable for the offence actually committed by any other member of the assembly. A mere possibility of the commission of the offence would not necessarily enable the court to draw an inference that the likelihood of commission of such offence was within the knowledge of every member of the unlawful assembly. It is difficult indeed, though not impossible, to collect direct evidence of such knowledge. An inference may be drawn from circumstances such as the background of the incident, the motive, the nature of assembly, the nature of arms carried by the members of the assembly, their common object and the behaviour of the members soon before, at or after the actual commission of the

> crime. Unless the applicability of Section 149 either clause is attracted and the court is convinced, on facts and in law, both, of liability capable of being fastened vicariously by reference to either clause of Section 149 IPC, merely because a criminal act was committed by a member of the assembly, every other member thereof would not necessarily become liable for such criminal act. The inference as to likelihood of the commission of the given criminal act must be capable of being held to be within the knowledge of another member of the assembly who is sought to be held vicariously liable for the said criminal act."

In the matter of **Parsuram Pandey and others Vs State of Bihar** reported in **(2004) 13 SCC 189** the Hon'ble Apex Court held that:-

> "To attract Section 149 IPC the prosecution must prove that the commission of the offence was by any member of an unlawful assembly and such offence must have been committed in prosecution of the common object of the assembly or must be such that the members of the assembly knew that it was likely to be committed. Unless these three elements are satisfied by the prosecution the accused cannot be convicted with the aid of Section 149 IPC."

19. Therefore, based on the above principle, we are required to ascertain from the facts and evidence available on record as to whether the accused/appellants were the members of the unlawful assembly, offence of murders of Deehu, Ratan & Bahoran was committed in prosecution of the common object of that assembly or the accused persons being members of the assembly were knowing that such offence is likely to be committed. The evidence which has been reproduced above does not show, in any manner, that these accused persons were having any common object with accused Mahendra & Gendlal or they were knowing that such an offence is likely to be committed by Mahendra & Gendlal. PW-3 Kanhaiya, PW-7 Uttam and PW-13 Holiram have not stated that these persons, in any manner, in the first instance participated in the assault. Even as per the evidence of Holiram (PW-13) these persons came after Deehu, Ratan and Bahoran died. Moreover, as has been discussed above, as per the evidence, they were carrying lathi, whereas, I.O. had recovered tabbal from Uttra and Bhagat. Even all the injuries found on the bodies of the deceased persons were caused by hard and sharp object. Therefore, prosecution has not been able to establish

against these persons that they were members of an unlawful assembly or there was any common object between Gendlal, Mahendra and these accused/appellants or that these appellants had knowledge that murder of anyone will be committed by other accused persons. Moreover, the main dispute was on account of the land left by Dukalha Bai in favour of Jagdish, therefore, the dispute was between Jagdish and the deceased party and not with these accused persons. Therefore, conviction of these accused/appellants under Section 302 with the aid of Section 149 of the IPC imposed by the trial court is not based on legal evidence and same cannot be sustained. Similarly, their conviction under Section 148 of the IPC also cannot be sustained for the reason that eyewitnesses have stated that they were carrying lathi, whereas, I.O. recovered tabbal from Uttra & Bhagat, as such, their conviction under Section 148 of the IPC cannot be sustained. As such, appeal preferred by accused/appellants Uttra Kumar, Amol Kumar and Bhagat alias Dhalwa deserves to be succeed.

20. As far as appeal (Criminal Appeal No.739/2002) preferred by accused/appellants Gendlal & Mahendra is concerned, as per the evidence of PW-3 Kanhaiya, PW-7 Uttam & PW-13 Holiram accused Gendlal assaulted Bahoran with tabbal, accused Mahendra assaulted Ratan with tabbal and Deehu was assaulted by Jagdish with Tabbal. The evidence of all the three witnesses is consistent and trustworthy. As far as their involvement is concerned, all the three witnesses have stated that these accused persons attacked Bahoran and Ratan with tabbal. However, it has been stated that Jagdish assaulted Deehu, but Jagdish has been acquitted by the trial court.

21. As far as argument advanced by learned counsel for the appellants that as the house of Kanhaiya is 1 km away from the place of occurrence, the presence of PW-7 Uttam, who is the son of Kanhaiya and PW-13 Holiram who is the grandson of Kanhaiya, is doubtful. But, we are not convinced with the argument of learned counsel for the appellants, for the reason, that their presence on the scene of occurrence stands established by the fact that accused Gendlal lodged the report against Aghnu & Pokhraj. In the cross-examination, in para-12, he has admitted that Gendlal lodged report against him, Aghnu, Pokhraj, Uttam, Ishwar, Dhannu, Deehu, Bahoran and Ratan for

the commission of offence under Sections 147, 148, 323 and 324/149 of the I.P.C. in which charge sheet has been filed against Kanhaiya and Uttam (PW-7) and the offence was regarding same incident in which Deehu, Bahoran and Ratan were murdered.

22. Now, coming to the argument advanced by learned counsel for the appellants that accused Mahendra and co-accused Bansi (died during trial) also received the injuries and same were not explained by the prosecution. The incident took place in the threshing field of Gendlal and charge sheet regarding commission of offence under Sections 147, 148, 323 and 324/149 of the I.P.C. has already been filed against the complainant party, therefore, the complainant was aggressor and the accused/appellants attacked the deceased in a right of private defence, therefore, no offence was made out against the accused persons. The evidence which has been referred above, the bodies of deceased persons Deehu, Bahoran and Ratan were lying in the threshing field of Gendlal. Similar is the evidence of PW-14 Ashok (I.O.) who prepared the site plan (Ex.-P/38-A). The place of occurrence has been shown as the threshing field of Gendlal and dead bodies were lying in the threshing field. As per the evidence of DW-4 Dr. Shrikant Rajimwale on 15-12-92 at 5 p.m. he examined injuries of Bansi. There was abrasion about 4" in length on the back of Bansi. There was bruise in the size of 2 ½" x 1/2" on the back side. There was swelling in the bruise. There was another bruise near the armpit. There was abrasion on the chest. There was lacerated wound on the head in the size of 2½"x ½"x1/2" and these injuries were caused by hard and blunt object. The injury report is Ex.-D/3. Similarly, there was lacerated wound in the size of 2½" x 1½" skin deep on the left wrist and injury report is Ex.-D/4. PW-3, Kanhaiya, in para-12 of the cross-examination, has stated that he had not seen head injury of Bansi and he is not able to tell if Bansi had any injury on the head, and how he had received that injury. If Ratan and Pokhraj were carrying Tabbal, then he is not aware of it. Aghnu was not holding Farsa, but he was holding Tabbal. It is correct to say that Deehu, Bahoran, Dhannu and Ishwar were holding lathi in their hands. Therefore, as per the evidence, the complainant party were having Tabbal and lathi in their hands. The incident took place in the threshing field of Gendlal in which the accused party received injuries and same have not been explained. In the matter of **Laxmi**

Singh and others V. State of Bihar reported in **(1976) 4 SCC 394** the Hon'ble Apex Court held that:-

> "Any non-explanation of the injuries on the accused by the prosecution may affect the prosecution case. But such non-explanation may assume greater importance where the evidence consisted of interested or inimical witnesses or where the defence gives a version which completes in probability with that of the prosecution. But where the evidence is clear, cogent and credit-worthy and where the Court can distinguish the truth from the falsehood, the mere fact that the injuries are not explained by the prosecution, cannot itself be a sole basis to reject such evidence and consequently the whole case."

Again in the matter of **Rizan and another V. State of Chhattisgarh** reported in **(2003) 2 SCC 661** the Apex Court held that:-

> "Non-explanation of the injuries sustained by the accused at about the time of occurrence or in the course of altercation is a very important circumstance. But mere non-explanation of the injuries by the prosecution may not affect the prosecution case in all cases. This principle applies to a case where the injuries sustained by the accused or minor and superficial or where the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and creditworthy, that it far outweighs the effect of the omission on the part of the prosecution to explain the injuries."

23. In the light of the above judgments of the Apex Court, if we look into the facts of the present case, as per the evidence of PW-3, the complainant party was having Tabbal and lathi in their hands. The incident took place in the threshing field of accused Gendlal in which accused Bansi (died during trial) sustained lacerated wound on the head and other simple injuries, as also accused Mahendra also sustained lacerated wound on the wrist of left hand, but same have not been explained, therefore, the defence of the accused persons that they acted in a right of private defence cannot be said to be baseless.

24. As far as prosecution case that Deehu went to fetch water from the well which was near the house of Gendlal is concerned, as complainant PW-1 Pokhraj has turned hostile and he has not supported the first information report, even I.O. PW-14 has not stated in his evidence that parts of the F.I.R.

were recorded as stated by Pokhraj. Moreover, it has come in the evidence that there was "well" behind the house of Deehu, therefore, what was the occasion for Deehu to go to borewell (well) which was near the house of Gendlal for fetching water. It has also come in the evidence of PW-7 that bucket which Deehu was carrying to fetch water was taken into possession by the police. But no such evidence has been tendered by the prosecution. Even I.O. PW-14 has not stated that he took into possession any bucket left by deceased Deehu on the place of occurrence. Therefore, it is established that accused/ appellants Gendlal and Mahendra assaulted the deceased persons in a right of private defence. Section 99 of the I.P.C. envisages that 'the right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence. Section 100 of the I.P.C. enumerates that 'the right of private defence of the body extends, under the restrictions mentioned in the last preceding section, to the voluntary causing of death or of any other harm to the assailant, if the offence which occasions the exercise of the right be of any of the descriptions hereinafter enumerated namely-(1) Such an assault, as may reasonably cause the apprehension that death will otherwise be the consequence of such assault; (2) Such an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault; rest of the clauses are not relevant in this case. Section 101 of the I.P.C. enumerates that 'if the offence be not of any of the descriptions enumerated in the last preceding section, the right of private defence of the body does not extend to the voluntary causing of death to the assailant, but does extend under the restrictions mentioned in section 99 to the voluntary causing to the assailant of any harm other than death.

25. From the evidence of Dr. Rajimwale (DW-4), accused Bansi (died during trial) and Mahendra received simple injuries, therefore, it cannot be said that the accused persons were apprehending that death will otherwise be caused or grievous hurt will be caused, as such accused persons namely Gendlal and Mahendra, in this case, exceeded the right of private defence and caused deaths of deceased persons Bahoran and Ratan, and even death of Deehu was caused by member of unlawful assembly in furtherance of the common object in which Jagdish, Asharam, Bansi and other accused persons, out of whom

Asharam & Bansi died during the trial, and Jagdish has been acquitted by the trial Court. As per the evidence of Dr. V.K. Tamrakar, deceased Ratan received as many as 7 injuries, out of which injury No.1 was incised wound on the right thigh 6" above knee; injury No.2 was incised wound on left parietal area in the size of 2 ½" x 1", it was bone deep, there was fracture of skull in the length of 1 ½"; injury No.3 was incised wound on the occipital area of the head in the size of 2 ½" x 1", bone deep and others were also incised wounds. As per the doctor's opinion, injuries were caused by sharp and hard object. Similarly, deceased Deehu received 5 incised wounds. There was fracture of radius and ulna. There was injury on the left eye. There was fracture of skull. The injuries were caused by sharp and hard object. Deceased Bahoran received incised wound on the top of the head. There was fracture and other incised wounds on the skull, therefore, the manner in which these 3 persons were done to death, they were assaulted brutally and mercilessly and they died on the spot instantaneously. In the first instance, accused persons received simple injuries and the act of accused Gendlal and Mahendra was not covered under Section 99 of the I.P.C. because when Ratan, Bahoran and Deehu received one or two injuries, then it cannot be said that even thereafter they were in a position to attack accused persons, but even then accused/appellants continued to attack with deadly weapon i.e. Tabbal, as a result of which deceased persons received fatal, fracture and severe injuries on the vital parts of their bodies, as a result of which they died spontaneously, therefore, the accused/appellants had exceeded the right of private defence. Therefore, the manner in which these persons were murdered, the offence against these accused/appellants under Section 304-I of the I.P.C. was made out.

26. From the above evidence, it is established that accused/appellants Gendlal and Mahendra exceeded the right of private defence. For the foregoing discussion, their convictions under Section 302 read with Section 149 of the I.P.C. cannot be sustained.

27. In the result,

A. Criminal Appeal No.669 of 2002 filed by accused/appellants Uttra Kumar, Amol Kumar and Bhagat @ Dhalwa is allowed. Their convictions under

Sections 302/149 and 148 of the I.P.C. and sentences imposed upon them under these offences are set aside. They are acquitted of these charges. They be set at liberty forthwith, if not required in any other case.

B. Criminal Appeal No.739 of 2002 preferred by accused/appellants Gendlal and Mahendra is partly allowed to the extent that their convictions under Section 302/149 of the I.P.C. and sentences imposed upon them under these offences are set aside, instead thereof each of accused/appellants Gendlal and Mahendra is convicted under Section 304 Part-I of the I.P.C.. Looking to the nature of the crime in which three persons were done to death, we are of the considered opinion that in the interest of justice they deserve to be sentenced to undergo imprisonment for life, therefore, each of accused/appellants Gendlal and Mahendra is sentenced to undergo imprisonment for life for commission of offence under Section 304 Part-I of the I.P.C.. Conviction of the accused/appellants and sentence imposed upon them under Section 148 of the I.P.C. are maintained.

Sd/-
L.C. Bhadoo
Judge

Sd/-
Dhirendra Mishra
Judge

Barve